United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT MATTHEWS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,731 and 21,732

362

UNITED STATES OF AMERICA, Appellee

v.

WILLIE J. PHILSON, Appellant

UNITED STATES OF AMERICA, Appellee

v.

JERRY M. MATTHEWS, Appellant

On Appeal from the United States District
Court for the District of Columbia

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(Appointed by this Court)

March 18, 1969

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3. Whether appellant Matthews was prejudiced by the failure of the trial judge's charge on aiding and abetting to explain that the jury could convict neither defendant in the absence of evidence of aiding and abetting.

4. Whether in-court identifications of appellant by two key witnesses were invalidated by the absence of counsel at pre-trial identification under the Sixth Amendment right to counsel.

/This case has not been before this Court previously on the merits./

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BRIEF FOR APPELLANT MATTHEWS

STATEMENT OF THE CASE

These are appeals from convictions of second degree murder arising out of the death of one Clarence H. Bennett, a cab driver, in July, 1967. The grand jury returned an indictment against the two co-defendants charging (1) felony murder (22 D.C. Code § 2401), (2) murder in the first degree (22 D.C. Code § 2401), and (3) assault with intent to commit robbery (22 D.C. Code § 501).

The two defendants were tried together before the

Hon. Richard B. Keech. At the close of the government's case, Judge Keech dismissed the first and third counts for insufficient evidence but as to the second count held there was sufficient evidence to go to the jury on the lesser included offenses of murder in the second degree (22 D.C. Code § 2403), and manslaughter (22 D.C. Code § 2405). Neither defendant himself testified or called any witnesses. The jury retired to consider its verdict at 10:05 a.m. At 1:45 p.m. the judge announced that a note from the jury requesting him to reread "the definition of malice (legal)" had been received. (Tr. 271-72). After the judge reread the portion of his charge dealing with malice, the jury again retired. At 2:45 p.m. the jury returned verdicts of guilty of murder in the second degree against both defendants.

Thereafter each defendant was sentenced to imprisonment of not less than eight years nor more than twenty-four years. The appellant in No. 21,731, Willie J. Philson, is presently in St. Elizabeth's Hospital. The appellant in No. 21,732, Jerry M. Matthews, is presently at Lorton Reformatory.

The killing of the cab driver took place in the vicinity of North Capitol and Q Streets, near Florida Avenue, at about 4 a.m. on July 9, 1967. No witnesses to the killing were produced at trial, and the evidence against appellants was purely circumstantial.

Two witnesses, both cab drivers, testified that appellant Matthews was at the Dari-Delite, a drive-in restaurant a few blocks away, at 3:45 a.m. asking for a cab (Tr. 31-34, 47-48).

One of the witnesses testified that Bennett was also present at the Dari-Delite at that time (Tr. 32-35). Appellant Matthews and Bennett left separately (Tr. 35, 37, 38, 46-48). Witnesses agreed that Bennett was in good health at that time, but there was a conflict in testimony as to whether or not Matthews was limping(Tr. 33, 37, 39, 46, 48).

At about 4 a.m. residents in the units block of Q Street, N.E., observed a cab "drifting" west on Q Street toward North Capitol Street with the inside light on. Shots numbering two to five were heard. Witnesses testified that while the cab was still moving one or two men jumped out and fled, running east on Q Street.1/ As the cab came to a stop on the safety island at North Capitol Street, Bennett got out and staggered onto a nearby vacant lot. Police witnesses testified that he was dead on their arrival. The cab's ignition switch was found in the accessory position, and the radio was playing. (Tr. 51-54, 55-59, 84-86, 88, 90, 94-95, 50-51).

1/ The witnesses' accounts varied significantly. Miss Walker testified that there were about two shots. She testified that two men got out of the right hand side of the cab and that they had on either light blue shirts or light shirts. One of the two men was holding his hand. (Tr. 54-54). Kelly did not testify that there were any shots, and he described one man as wearing khaki shirt and trousers. (Tr. 55-56). The statement of Reeder claimed that the two men came out of opposite sides of the cab, one wearing a maroon shirt and the other a beige shirt. Reeder heard four or five shots. He thought the man with the maroon shirt had no injuries. (Tr. 84-86). The statement of Sybot reported two or three shots. (Tr. 88). The statement of Miss Scott reported that she heard several shots, that only one man fled the cab, and that he had on a light shirt and dark pants (Tr. 90-91). The statement of

The deputy coroner testified that cause of death was a gunshot wound in the aorta. There were three other bullet wounds in the chest, neck, and shoulder, and the throat had multiple lacerations. (Tr. 96-100). No pistol was found that matched the bullets taken from Bennett. (Tr. 106).

Police witnesses testified that there was a hole through the back of the front seat in the cab. On the rear floor of the cab in a pool of beer was a beer can bearing appellant Philson's fingerprint on the top, a can top tab, a black low-cut man's shoe, and an expended slug. There was some change scattered on the floor of the cab in front, but Bennett's watch, folding money, wallet, and money belt appeared untouched. There was blood on the front and rear seats. (Tr. 121-22, 151-56, 160, 163, 189-94). A pistol with a white handle similar to one seen in Bennett's possession earlier in the morning, which had been fired four times, was found between the seat and the back rest of the front seat of the cab. (Tr. 33-34, 151, 162-63).

Police at the scene found a trail of blood drops along the south sidewalk line of Q Street from a point west of 9 Q Street to First Street, N.E.; on First Street one block from Q to Quincy Place on the north; and on Quincy Place from First Street to mid-way between 41 and 43 Quincy Place.

1/ (Footnote continued from previous page).

Miss Hanigan reported that a boy fled the cab, dressed in a beige colored short sleeve shirt and beige colored trousers. (Tr. 95).

There were no deviations into walkways or yards. (Tr. 158-60, 178-80).

A resident of Quincy Place, N.E., Elijah Roberson testified that at about 4 a.m. a person he identified as appellant Philson came to the door of 53 Quincy Place and asked to use the telephone.[2/] Roberson testified that the person was holding one of his hands on which were was something red. Roberson's mother informed the person that the phone was disconnected. The person left the porch and helped another man who was stooped over up Quincy Street, either west toward Lincoln Road or east toward First Street, N.E. -- the witness testified positively as to both. Roberson could not identify the second man. (Tr. 64-82).

At about 5 a.m. police and an ambulance were called to appellant Matthews' home at 712-1/2 Thirteenth Street, N.E., where Matthews lay injured with bullet wounds in his left leg and right shoulder.[3/] Philson was present and had on blood-stained clothes but appeared uninjured.[4/] Matthews reported to

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2/ Roberson testified that Philson was wearing brown khaki pants and a light jacket shirt. (Tr. 68-69).

3/ Officers Butler and White testified that Matthews was wearing a black short sleeve shirt and a pair of blue trousers but no shoes. (Tr. 126-35, 141).

4/ Officer Butler testified that Philson had on khaki pants and a plaid shirt that had a combination of colors -- blue and red -- he thought. (Tr. 128, 137). Officer White testified that Philson had on khaki trousers. (Tr. 141).

police officers that he had received the injuries in a fight on Wylie Place. Philson told police he had encountered Matthews at 12th and H Streets and had helped him the rest of the way home. Philson left after Matthews was taken to Casualty Hospital. (Tr. 104, 125-132, 136-43, 218). The bullets taken from Matthews' leg and shoulder were later found to match the pistol recovered from Bennett's cab. (Tr. 104-05).

At about 6 a.m., while Matthews was being treated at Casualty Hospital, appellant Philson appeared to request treatment for a puncture wound in the left hand. He reported to police officers that he had been mugged near a bootleg joint at 14th and H Streets, N.E. He was wearing different clothes from those he had been wearing at Matthews' apartment. (Tr. 133-46).

When arrested in the Robbery Squad room at Police Headquarters the following day, Philson was found to have a pocket knife with a red substance on the blade. (Tr. 165-170, 209-13). The record is unclear as to the time and place of Matthew's arrest. (Tr. 165, 171).

ARGUMENTS

THE EVIDENCE AGAINST APPELLANT MATTHEWS WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

> [With respect to his argument on insufficiency of the evidence, Appellant Matthews respectfully invites the Court's attention to the following pages of the reporter's transcript in Criminal No. 1150-67: Tr. 1-2, 31-39, 46-59, 62-82, 84-86, 88, 90-91, 94-100, 104-07, 121-22, 126-46, 151-56, 158-67, 171, 178-80, 189-91, 218-34, 256-72.]

Pursuant to Federal Rule 29(a) appellant Matthews moved at the close of the government's case for acquittal on the ground that insufficient evidence of his guilt had been introduced (Tr. 219-24). The trial court's denial of this motion was erroneous under the applicable legal standards.

In ruling on appellant Matthews's motion for acquittal, the trial judge was required to determine whether there would be a doubt in a reasonable mind that every reasonable hypothesis of innocence was excluded. It is well-settled law in this jurisdiction that:

> It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the

fixed bounds of jury consideration. . . . .

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion. . . . /Curley v. U.S., 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232 (1947), cert. den. 331 U.S. 837 (1947) (footnotes omitted)./

Where the evidence falls short of proof beyond a reasonable doubt this court has consistently reversed the trial court's failure to direct a verdict of acquittal. See Hemphill v. U.S., ___U.S.App.D.C.___, 402 F.2d 187 (1968); Borum v. U.S., 127 U.S.App.D.C. 48, 380 F.2d 595 (1967); Cephus v. U.S., 117 U.S.App.D.C. 15, 324 F.2d 893 (1963); Campbell v. U.S., 115 U.S.App.D.C. 30, 316 F.2d 681 (1963); Isaac v. U.S., 109 U.S.App.D.C. 34, 284 F.2d 168 (1960); Collins v. U.S., 101 U.S.App.D.C. 160, 247 F.2d 566 (1957); Scott v. U.S., 98 U.S.App.D.C. 105, 232 F.2d 362 (1956); Freidus v. U.S., 96 U.S.App.D.C. 133, 223 F.2d 598 (1955); Cooper v. U.S., 94 U.S. App.D.C. 343, 218 F.2d 39 (1954).

A. The Evidence Did Not Exclude Every Reasonable Hypothesis but that of Guilt.

Where the evidence against a defendant is wholly circumstantial, as it is in this case, there must be substantial evidence of facts which exclude every reasonable hypothesis but that of guilt. Carter v. U.S., 102 U.S.App.D.C. 227, 231-32, 252 F.2d 608, 612-13 (1957). In Carter the Court held that

it was not enough that the hypothesis of guilt be more likely than that of innocence; rather, in order to sustain the conviction, any reasonable hypothesis of innocence must be excluded by the facts. Cf. Hammond v. U.S., 75 U.S.App.D.C. 397, 127 F.2d 752 (1942); Williams v. U.S., 78 U.S.App.D.C. 322, 323, 140 F.2d 351, 352 (1944); Kemp v. U.S., 114 U.S. App.D.C. 88, 311 F.2d 774 (1962); Stevens v. U.S., 115 U.S.App.D.C. 332, 319 F.2d 733 (1963). This is the rule in this jurisdiction, and it is generally accepted in other federal courts. See, e.g., Matthews v. U.S., 394 F.2d 104 (9th Cir. 1968); Thomas v. U.S., 369 F.2d 372 (9th Cir. 1966); U.S. v. Dolasco, 184 F.2d 746 (3d Cir. 1950); Riggs v. U.S., 280 F.2d 949 (5th Cir. 1960); Davis v. U.S., 385 F.2d 919, 921 (5th Cir. 1967).

In the Kemp case, supra, where the defendant was convicted of aiding and abetting the unauthorized use of a motor vehicle, there was no direct evidence of scienter. The prosecution attempted to supply this element by showing that the defendant was a passenger in the vehicle and did and observed certain other things. All these things, the Court noted, however, were consistent with innocence as well as with guilt, and hence the Court held that the judge erred in not taking the case from the jury. Conviction, the Court said, required more than evidence that the defendant did things a person might do with or without guilty knowledge. Without evidence from which guilty knowledge could be unambiguously

inferred, the jury's verdict could have been reached only by impermissible speculation as to that element of the offense.

In Stevens, supra, a similar case, this Court said in reversing the conviction of a passenger in a stolen car, "There is evidence which suggests guilt . . .. Perhaps it could be said there is a preponderance of evidence against Mackey but that is not enough to meet the standard of proof in a criminal case." 115 U.S.App.D.C. at 334, 319 F.2d at 735; cf. Cooper v. U.S., 94 U.S.App.D.C. 343, 346, 218 F.2d 39, 42 (1954).

Likewise, in Cooper v. U.S., 123 U.S.App.D.C. 83, 85, 357 F.2d 274, 276 (1966), Judge Edgerton stated:

> . . . I think the Government's evidence was only sufficient to create a reasonable suspicion, or at most a likelihood, that Cooper was guilty. Perhaps the jury could reasonably think he was probably guilty, but this is not enough to support a criminal conviction.

In this case the government's evidence connecting appellant Matthews with the homicide showed at most (1) that appellant was at approximately 3:45 a.m. at the Dari-Delite -- in the general vicinity of the crime, inquiring of drivers whether any cabs were available for fares; (2) that at approximately 5:00 a.m. police officers responded to a call from 712 1/2 13th Street, N.E., where Matthews lived and where he was in the company of Philson who was later identified as having been within one block of the scene of the crime at approximately 4:00 a.m.; (3) that police officers took appellant Matthews to Casualty Hospital where two slugs were removed from his right shoulder and left leg, both of which slugs matched the pistol found at the scene of the crime between the seat and back rest of the front seat of Bennett's cab; (4) that

a black, low-cut man's shoe was found on the back floor of Bennett's cab and that when police arrived at 712 1/2 13th Street, N.E., Matthews was not wearing shoes.

Considering these points individually, each is fully consistent with appellant's innocence.

(1) Cab drivers Ferguson and Tucker testified that Matthews was alone at the Dari-Delite at about 3:45 a.m. inquiring if any cabs were available for service and that he left alone at approximately 3:45 a.m. and walked east across New Jersey Avenue. (Tr. 36-39, 47-48) This simply proves that Matthews was in the general vicinity (within 6 to 7 blocks) of the area where Bennett's body was found and that he was attempting to hire a cab. At most, it suggests that Matthews was in a position as to time and geographical proximity to hail Bennett's cab. It is equally consistent that Matthews did not get in Bennett's cab as it is that he did obtain the services of Bennett's cab. Cf. Carter v. U.S. 102 U.S.App.D.C. 227, 231-32, 252 F.2d 608, 612-13 (1957) This hypothesis is supported by the fact that Matthews was requesting a cab at the Dari-Delite, obviously within the hearing distance of Bennett, and that even though they left the Dari-Delite at approximately the same time, Bennett made no gesture to pick up Matthews. (Tr. 38, 45-49, 236)

Also, supporting Matthew's absence from Bennett's cab was the fact that of the six witnesses who offered descriptions of individuals seen running from Bennett's cab at the time of the crime, none could identify Matthews. Nor did any of the

witnesses describe the fleeing individuals as wearing the color of clothing worn by Matthews that night (black shirt and blue trousers) as described by Officers Butler and White. (Tr. 126-135, 141)

One witness, Roberson, identified Philson and testified that he was helping along Quincy Street another man that was stooped over. Roberson, who was only several feet from that (stooped over) person on Quincy Street, had ample opportunity to observe appellant Matthews in court, yet could not identify him as being the "stooped over" man accompanying Philson. (Tr. 69)

Also consistent with Matthews absence from the cab is the failure of the government to introduce findings from laboratory examinations on the blood samples taken from the back seat of the cab. Officer Cannon testified that he removed blood scrapings from both the front and back seats. (Tr. 154, 161) At trial no attempt was made to introduce evidence regarding any analysis of these blood scrapings or to attempt to prove their recentness. See Hemphill v. U.S., __ U.S.App.D.C. ___, 402 F.2d 187, 193 (1968).

(2) and (3) That Matthews was found injured at 5:00 a.m. in the company of Philson who later was identified as being near the scene of the crime, and that when Matthews was taken to Casualty Hospital for treatment the bullets taken from his shoulder and leg matched the gun allegedly owned by the cab driver and found in the cab at 4:00 a.m. (Tr. 151) is consistent with involvement in the crime. But it is equally consistent with non-involvement in the crime.

First, that Matthews was in the company of Philson at 5:00 a.m. is fully consistent with appellant's contention that he met Philson and requested his assistance in getting home after being injured in an unrelated incident. This is supported by the fact that Matthews was seen alone at the Dari-Delite and left the same alone. (Tr. 36-39, 47-48)

Second, that two bullets removed from Matthews matched the gun found in the cab of Bennett at 4:00 a.m. is not inconsistent with Matthews absence from the cab at the time of the murder. It is consistent that Matthews was wounded by that gun at another time and another place by Bennett or person(s) unknown. The only evidence tying ownership of the gun to Bennett was the testimony that he was seen at the Dari-Delite with a similar white-handled gun. (Tr. 34) Guns with white handles are simply too common, especially in absence of additional evidence, to prove Bennett's ownership of the specific gun found in the cab.

The mere presence of identifying evidence alone is insufficient to place an accused person at the scene of a crime at a fixed time. In Borum v. U.S., 127 U.S.App.D.C. 48, 380 F2d 595 (1967), this Court held that a conviction for housebreaking could not be predicated on fingerprints "lifted" from objects in the complainant's home in the absence of evidence that such objects were generally inaccessible to the defendant because of the custody or location of the objects prior to the crime.

Borum stands for the proposition that the government must negate the possibility of an innocent explanation for fingerprints found at the scene of the crime. Such evidence would be testimony that defendant had no legitimate access to the robbed home. See Stevenson v. U.S., 127 U.S.App.D.C. 43, 380 F.2d 590 (1967).

Similarly, in Hiet v. U.S., 124 U.S.App.D.C. 313, 365 F.2d 504 (1966), the mere presence of a fingerprint taken from the inside of the vent window of a parked automobile from which personal property had been stolen was held insufficient to sustain a conviction for grand larceny. Cf. Cephus v. U.S., supra, where defendant's fingerprint was found on the outside of a stolen car.

Here, as clearly as in Borum or Hiet, the mere presence of the bullets in Matthews does not, in the absence of additional proof, compel the inference that appellant was in the cab and injured at the time Bennett was shot. One of the two witnesses identifying Matthews at the Dari-Delite testified that he was limping one one foot, raising the possibility that Matthews could have been injured at the time he was identified at the Dari-Delite. (Tr. 43) In the Stevenson case, supra, this court differentiated Borum and Hiet on the basis that the government introduced additional evidence in Stevenson showing that the fingerprints could not have been placed on the stolen merchandise in any other way but illegally. In this case, the government has failed to provide such additional evidence.

3) The fact that a black low-cut man's shoe was found on the back floor of the cab (Tr. 153) and that police officers testified that upon responding to a call at appellant's home at 712 1/2 13th Street he was not wearing shoes is insufficient to support the conviction. (Tr. 126) At no time was evidence introduced that proved the particular shoe found in the cab belonged to Matthews. No effort was made to show that the shoe in the cab was of a size that would fit appellant or that it was of a style customarily worn by appellant. However, by inuendo it is suggested that since Matthews was not wearing shoes and since a shoe was found in the cab, he must have lost such shoe in the cab. It is equally consistent that appellant did not lose his shoe in the cab and that, upon arriving home and being in pain from an injury obtained in an unrelated incident, he removed his shoes in his home. Even so, the presence of appellant's shoe in the cab is fully consistent with appellant's having ridden in the cab earlier in the evening or at another time. But again, even the presence of appellant in the cab on the morning of the crime would not have been sufficient to convict. Cf. Jones v. U.S., 119 U.S.App. D.C. 213, 338 F.2d 553 (1964) (per curiam).

Taking the foregoing items collectively, they are not sufficient to sustain appellant's conviction for murder. While the evidence may well raise a suspicion that appellant

Matthews was in the taxicab at the time Bennett was killed (which killing was murder) and that appellant might have participated in some way in the murder, mere suspicion is not enough. cf. Stevens v. U.S., supra, Cooper v. U.S., supra, Kemp v. U.S., supra.

Nor can the evidence be taken to exclude the hypothesis that co-defendant Philson, in the company of someone other than appellant Matthews,[1/] was involved in the murder of Bennett and that Matthews, injured in an unrelated incident, simply met Philson on the street and requested assistance to his home.

The government's evidence, giving full range short of speculation to the jury to draw inferences and resolve conflicts, cf. Curley v. U.S., supra, shows at most that appellant Matthews was an accessory after the fact, 22 D.C. Code § 106, and indictable crime with which he was not charged. Cf. Smith v. U.S., 113 U.S.App.D.C. 126, 306 F.2d 286 (1962). There is a total and utter lack of evidence which establishes Matthews whereabouts at the time of the crime or that he participated in any way in the crime itself. At most, the evidence might implicate

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1/ The failure of the government to produce the murder weapon at trial is consistent with the hypothesis that someone other than Matthews was in the cab.

Matthews as an accessory after the fact on the theory that he was found in the presence of Philson within an hour after the crime. Indeed, it is doubtful that the government has supplied evidence establishing all the elements necessary to convict even under Section 106.

B. The Jury Was Allowed to Speculate as to Which One of Appellants was Guilty, There Being No Evidence as to Aiding and Abetting.

Assuming arguendo that the jury might properly have found that both appellants were present in the taxicab at the time Bennett was murdered and further that one of them did murder Bennett, the jury was allowed to speculate as to which one of appellants was guilty. The record contains no evidence that appellant Matthews shot Bennett or aided and abetted Philson in the murder of Bennett. The trial judge should have granted appellant's motion for acquittal on this ground. Even assuming that the motion for acquittal was properly denied, the jury would have been confused by trial court's charge on aiding and abetting.

The government produced no witnesses to the slaying of Bennett. Assuming that both defendants were in the cab at the time Bennett was shot, there is no evidence that either aided or abetted the other within the intendment of 22 D.C. Code § 105. Under these circumstances there is no basis in the record for permitting the jury to convict more than one defendant.

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Moreover, there is no basis in the record for the jury's choosing between the defendants, so that conviction of either would have rested on pure speculation.

Mere physical presence of the defendant at the time and place of commission of the crime is not by itself sufficient to establish his guilt as an aider and abettor. The jury must find some affirmative conduct in furtherance of a common criminal design or purpose in order to find a defendant guilty as an aider and abettor. U.S. v. Williams, 341 U.S. 58, 64-65 (1951); Cooper v. U.S., 123 U.S.App.D.C. 83, 357 F.2d 274 (1966); cf. Jones v. U.S., D.C. Circuit No. 21,866 (decided October 17, 1968); U.S. v. Honeycutt, 311 F.2d 660, 662 (4th Cir. 1962); U.S. v. Neverson, 1 Mackey (12 D.C.) 152, 156-57 (1880).

In U.S. v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), where the appellant was one of two convicted on a counterfeiting charge, the Court reversed the conviction on the ground that presence and knowledge were not enough and that the trial judge should have charged the jury that aiding and abetting required participation.

The trial court's charge on aiding and abetting (Tr. 262-63) obscured the very vital point that the jury could not convict either defendant, assuming it found both to be present, in the absence of evidence that one defendant aided and abetted the other. While the judge's charge necessarily had to encompass

the possibility that the jury would find that either or both were not present, the general principles stated did not give adequate guidance to their application to the particular fact hypothesis here suggested. Where a subtle legal point such as this is presented, the trial judge must necessarily explain the point to the lay jurymen in order for them to act intelligently. His failure to do so was plain error and highly prejudicial to appellant. Cf. U.S. v. Garguilo, 310 F.2d 249, 254-55 (2d Cir. 1962); Moore v. U.S., 356 F.2d 39, 43 (5th Cir. 1966).

THE PRE-TRIAL IDENTIFICATION OF APPELLANT MATTHEWS, MADE IN ABSENCE OF COUNSEL, TAINTED THE IN-COURT IDENTIFICATION UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL

> /With respect to his argument on absence of counsel at a critical stage, Appellant Matthews respectfully invites the Court's attention to the following pages of the reporter's transcript in Criminal No. 1150-67 and of the Preliminary Hearing in Case No. 474: Tr. 36-39, 47-48, 171, 218; Preliminary Hearing 6-97

After June 12, 1967 a suspect must, as a matter of Sixth Amendment right, be afforded the assistance of counsel at pre-trial lineups and confrontations. U.S. v. Wade, 388 U.S. 218, 223-39 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967); Stovall v. Denno, 388 U.S. 293, 296-301 (1967). Supreme Court consideration of violations at pre-trial identifications

has been extended to include photographic identification as well as identifications in lineups or individual person-to-person confrontations. Simmons v. U.S. 390 U.S. 377 (1968).

In this case the government did not rely on any pre-trial identifications. There was no direct evidence that Matthews was subjected to a lineup, person-to-person confrontation or photographs. Instead they relied on in-court identifications by the two cab drivers who swore that Matthews was in the general vicinity of the crime about the time the murder occurred.

Appellant Matthews was arrested at Casualty Hospital (Preliminary Hearing 6) on July 11 and placed under custody.[1/] At that time he did not have benefit of counsel. Although the trial court record is barren on the issue, appellant contends that, after arrest and while in the custody of the police at the hospital, a photographer was brought into his room and, over his objections, photographs were made of him.

Also, the trial court record offers no explanation as to how, why and under what circumstances such photographs might

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1/ Transcript offers no evidence of date or place of arrest of Matthews. Metropolitan Police Department records show that he was arrested on July 11, 1967.

have been made and how they were later used. However, some inferences can be drawn from the record of the Preliminary Hearing and the trial transcript.

From what appears in both those records neither of the two crucial government witnesses, cab drivers Ferguson and Tucker, were ever brought before Matthews for a face-to-face individual confrontation. (Preliminary Hearing 9) Nor was there an indication that Matthews was ever placed in a lineup from which such witnesses could have identified him. Further, witnesses recognition was not based upon any prior acquaintance with Matthews.

The first indication that any witnesses placed Matthews in the vicinity of the crime in the early morning of July 9, 1967 came at the preliminary hearing on August 3, 1967 (Preliminary Hearing 7). At that hearing Officer Edwin C. Coppage testified that "someone" had identified appellant Matthews. The Officer also acknowledged that as of that date, August 3, 1967, Matthews had not been placed in a lineup for identification purposes. (Preliminary Hearing 9)

Therefore it appears that it was not until November 26, 1967, that the two cab drivers took the witness stand and positively identified appellant Matthews as the person they saw at the Dari-Delite in the early morning of July 9, 1967-- over 4 months later. (Tr. 36-39, 47-48)

It is illogical to assume that at no time during these four (4) months were the two key witnesses asked to identify the accused. It is highly unlikely that the government would gamble that the witnesses who could place Matthews in the vicinity of the crime could make an in-court identification without some form of pre-trial confrontation.

Reliance solely on an in-court identification becomes even more suspicious considering that each of these two witnesses 1) did not know and had never seen Matthews prior to that night; (Tr. 36-39, 47-48) and 2) saw Matthews only for a few seconds outside the Dari-Delite in the early morning hours. (Tr. 36, 47, 48)

From this negligible evidence in the record, it would appear that both of these witnesses had, at some time prior to trial, an opportunity to view either the appellant Matthews or had an opportunity to make a photographic identification. The latter seems more plausible in view of Appellant's contention that photographs were taken of him at the hospital and in view of the absence of evidence of any lineup or face-to-face confrontations.

The lack of information in this record on appeal as to the precise circumstances surrounding the identifications by witnesses Ferguson and Tucker is, obviously, the consequence of the fact that this issue was not raised in the District Court.

However, this Court has held that because of the importance of pre-trial identifications they would not be precluded from considering such issues not raised at trial. Smith v. U.S., ___U.S.App. D.C.___, ___F.2d___(1968); Wright v. U.S., ___U.S.App.D.C.___, ___F.2d___ (1968). In discussing the application of Federal Rule 52(b) to Wade claims, this Court has noted that "Improper identification procedures may violate constitutional rights, and it is difficult for us to conclude that these rights are not 'substantial'." Solomon v. U.S., D. C. Cir. No. 22,155 (decided Feb. 12, 1969) In fact, this Court has indicated that it will examine pre-trial identifications even though the point is not briefed or raised by Appellant's counsel on oral argument and even though such point is not pursued in response to questions proferred by the Court. Dade v. U.S., D.C. Cir. No. 20,712 (decided Dec. 24, 1968)

In Wade, supra, the Supreme Court held that the Sixth Amendment guarantees an accused the right to counsel at pre-trial proceedings where the results might well determine his fate and where absence of counsel might derogate from his right to a fair trial. Pre-trial lineups were determined to be a critical prosecutive stage at which defendant was entitled to the aid of counsel. The Court said:

> "In sum the principle of Powell v. Alabama and succeeding cases require that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself..." 388 U.S. at 227.

In that case the government argued that the lineup was a mere preparatory step in the gathering of the prosecution's evidence, not different from other preparatory steps such as scientific analysis of accused's fingerprints, blood samples and clothing. Rejecting that argument, the Court adverted to the chronic uncertainities of eyewitnesses, "confrontations compelled by the State between the accused and the victim or witnesses to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." 388 U.S. at 228.

Special attention was given in Wade, supra, to the situation where the identifying witnesses are strangers as is the situation with the two cab drivers in this case, "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." 388 U.S. at 228. Finally, the Wade court discussed the inherent

suggestibility that accompanies pre-trial identifications and noted that neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the accused. 388 U.S. at 230.

In Simmons, supra, the Supreme Court considered the hazards of initial identification by photographs. Although the question of whether the showing of photographs constituted such a "critical confrontation", thus requiring presence of counsel, was not before the Court, they implied that such confrontations were to be considered a "critical stage". The Court employed the Pre-Wade, Gilbert, Stovall analysis to photographs—thus suggesting that they would, in the future, view pre-trial identification by photograph on the same footing as individual person-to-person confrontations and lineups. 390 U.S. 377 (1968). Also, Judge Wright has stated: "As with one-man lineups, one-man picture viewings, especially where the officers had other pictures readily available, are also to be viewed suspiciously." Clemons v. U.S., D.C. Cir. No. 19,846 (decided Dec. 6, 1968)

The circumstances of the instant case suggest that the pre-trial identifications, presumably by photograph, were a "critical stage" in Appellant Matthew's case. The two cab drivers were the only witnesses who could place Matthews in the vicinity about the time of the crime. Clearly, this fits the criteria of a pre-trial proceeding where the results might well determine accused's fate. Wade, supra, at 224.

Here, because of the absence of evidence in the record, there is serious difficulty in depicting precisely what transpired at the pre-trial identification stage. Assuming arguendo that photographs were taken in the hospital, did the photographs suggest, in any manner, that Matthews was injured? Was there any indication that Matthews was under suspicion or had, at the time, been arrested for the murder of Bennett? Was only the photograph of Matthews shown to the witnesses or was it one of several shown to witnesses? Did the photographs, if more than one, shown to witnesses emphasize the one of Matthews?

The presence of counsel for Matthews at such a critical stage of proceedings could have served to clarify many of the questions surrounding this issue and certainly could have enabled counsel to make informed challenges at trial to either the admissibility or credibility of the identification evidence.

In this instance there is no problem with the prospective application rule fashioned by Stovall v. Denno, supra. The Supreme Court rendered its decisions in Wade, Gilbert, and Stovall on June 12, 1967. Appellant Matthews was arrested on July 11, 1967 and pre-trial identifications were presumably made between that date and the date of the trial, November 28, 1967 —falling within the ambit of Wade-Gilbert-Stovall.

Further, there appears to be no difficulty with Simmons, supra, where the Court made clear that, in the case of photographs, only a due process issue can be involved where the police problem is one of getting leads to possible suspects. Simmons v. U.S., supra; Clemons v. U.S., supra. In Simmons the perpetrators of the robbery were still at large and the law enforcement officials had only inconclusive clues. It was essential that the FBI agents swiftly determine if they were on the right track, so they could deploy thier forces to Chicago and surrounding cities. 390 U.S. at 384-85. A different situation existed in this case. Both Matthews and Philson were in custody and the law enforcement officials were apparently gathering evidence for use at trial. In addition, by the limited amount of information available in the record, this does not appear to be a case involving identification simultaneous with arrest, near the scene identification, nor spontaneous identification. Stewart v. U.S., D.C. Cir. No. 20,983 (decided Feb. 10, 1969); Hemphill v. U.S., ___U.S.App. D.C.___, 402 F.2d 187 (1968).

This Court has held that in pre-trial identification situations where the factual picture is incomplete, the case will be remanded to the District Court for the taking of such evidence and the making of such findings as may be appropriate.

Gross v. U.S., D.C. Cir. No. 20,953 (decided Feb. 19, 1969); Patricio Mendoza-Acosta a/k/a Guadalupe H. Aguilar v. U.S., D.C. Cir. No. 21,754 (decided Feb. 11, 1969); Clemons v. U.S., D.C. Cir. No. 19,846 (decided Dec. 6, 1968); Smith v. U.S., ___ U.S.App.D.C.___, ___F.2d___(1968); Wright v. U.S., ___U.S.App.D.C. ___, ___F.2d___(1968).

Further, this Court has indicated its intended course of procedure when a Sixth Amendment right to counsel has been violated in a pre-trial identification:

> In the conduct of trials involving post-Wade and Gilbert identifications, the mode of proceeding would seem to be as follows: Whenever the prosecution proposes to make eye-witness identification a part of its case, the defense is entitled to know, through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury the circumstances of any pre-trial identification. If it was one where the court finds that the Sixth Amendment right to counsel existed but was not observed, the prosecution may not, under the per se exclusionary rule enunciated by the Supreme Court in Gilbert, offer such identification as part of its case; and the same rule would appear to be applicable with respect to prosecution evidence of post-Stovall pre-trial identifications found by the court to be violative of due process.
>
> Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eye-witness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. If the

> judge regards only the in-court identifications as admissible, in the trial to the jury thereafter, the defense may as a matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification. Clemons v. U.S., D.C. Cir. No. 19,846 (decided Dec. 6, 1968).

CONCLUSION

The judgment below should be reversed. If the determination of this Court is that there was insufficient evidence to support the jury's verdict of guilty on Count Two, the case should be dismissed in any event. If the determination of the Court is that the judge's charge on aiding and abetting was prejudicial to appellant, the case should be remanded to the District Court for retrial. If the determination of the Court is that appellant had a right to counsel at pre-trial identification and that such right was not observed or, alternatively, that the factual picture is incomplete, the case should be remanded for the taking of such evidence and the making of such findings as may be appropriate.

Respectfully submitted,

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March 18, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be delivered by hand this 18th day of March, 1969, a copy of the foregoing brief for appellant Matthews to the office of the U.S. Attorney for the District of Columbia, 3818 U.S. Courthouse, Washington, D.C. 20001.

Ruth L. Prokop

RUTH L. PROKOP

March 18, 1969

APPENDIX

Statutes and Rules

22 D.C. Code:

§ 22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 903.)

§ 22-106. Accessories after the fact.

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than twenty years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 909.)

§ 22-501. Assault with intent to kill, rob, rape, or poison.

Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than two years or more than fifteen years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 803; Dec. 27, 1967, Pub. L. 90-226, § 601, title VI, 81 Stat. 736.)

§ 22-2401. Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339.)

§ 22-2403. Murder in second degree.

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339.)

§ 22-2405. Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802.)

Federal Rules of Criminal Procedure:

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 52. Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

February 28, 1966, eff. July 1, 1966.

BRIEF FOR APPELLANT PHILSON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,731 and 21,732

WILLIE J. PHILSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

JERRY M. MATTHEWS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District
Court for the District of Columbia

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January 21, 1969

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3. Whether appellant Philson was prejudiced by the failure of the trial judge's charge on aiding and abetting to explain that the jury could convict neither defendant in the absence of evidence of aiding and abetting.

[This case has not been before this Court previously on the merits.]

In the

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,731, 21,732

WILLIE J. PHILSON, Appellant

v.

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JERRY M. MATTHEWS, Appellant

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UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT PHILSON

STATEMENT OF THE CASE

These are appeals from convictions of second degree murder arising out of the death of one Clarence H. Bennett, a cab driver, in July, 1967. The grand jury returned an indictment against the two co-defendants charging (1) felony murder (22 D.C. Code § 2401), (2) murder in the first degree (22 D.C. Code § 2401), and (3) assault with intent to commit robbery (22 D.C. Code § 501).

The two defendants were tried together before the

Hon. Richmond B. Keech. At the close of the government's case, Judge Keech dismissed the first and third counts for insufficient evidence but as to the second cound held there was sufficient evidence to go to the jury on the lesser included offenses of murder in the second degree (22 D.C. Code § 2403), and manslaughter (22 D.C. Code § 2405). Neither defendant himself testified or called any witnesses. The jury retired to consider its verdict at 10:05 a.m. At 1:45 p.m. the judge announced that a note from the jury requesting him to reread "the definition of malice (legal)" had been received. (Tr. 271-72). After the judge reread the portion of his charge dealing with malice, the jury again retired. At 2:45 p.m. the jury returned verdicts of guilty of murder in the second degree against both defendants.

Thereafter each defendant was sentenced to imprisonment of not less than eight years nor more than twenty-four years. The appellant in No. 21,731, Willie J. Philson, is presently in St. Elizabeth's Hospital. The appellant in No. 21,732, Jerry M. Matthews, is presently at Lorton Reformatory.

The killing of the cab driver took place in the vicinity of North Capitol and Q Streets, near Florida Avenue, at about 4 a.m. on July 9, 1967. No witnesses to the killing were produced at trial, and the evidence against appellants was purely circumstantial.

Two witnesses, both cab drivers, testified that appellant Matthews was at the Dairy Delight, a drive-in restaurant a few blocks away, at 3:45 a.m. asking for a cab (Tr. 31-34, 47-48).

One of the witnesses testified that Bennett was also present at the Dairy Delight at that time (Tr. 32-35). Appellant Matthews and Bennett left separately (Tr. 35, 37, 38, 46-48). Witnesses agreed that Bennett was in good health at that time, but there was a conflict in testimony as to whether or not Matthews was limping (Tr. 33, 37, 39, 46, 48).

At about 4 a.m. residents in the units block of Q Street, N.E., observed a cab "drifting" west on Q Street toward North Capitol Street with the inside light on. Shots numbering two to five were heard. Witnesses testified that while the cab was still moving one or two men jumped out and fled, running east in Q Street.[1/] As the cab came to a stop on the safety island at North Capitol Street, Bennett got out and staggered onto a nearby vacant lot. Police witnesses testified that he was dead on their arrival. The cab's ignition switch was found in the accessory position, and the radio was playing. (Tr. 51-54, 55-59, 84-86, 88, 90, 94-95, 50-51).

1/ The witnesses' accounts varied significantly. Miss Walker testified that there were about two shots. She testified that two men got out of the right hand side of the cab and that they had on either light blue shirts or light shirts. One of the two men was holding his hand. (Tr. 54-54). Kelly did not testify that there were any shots, and he described one man as wearing khaki shirt and trousers. (Tr. 55-56). The statement of Reeder claimed that the two men came out of opposite sides of the cab, one wearing a maroon shirt and the other a beige shirt. Reeder heard four or five shots. He thought the man with the maroon shirt had no injuries. (Tr. 84-86). The statement of Sybot reported two or three shots. (Tr. 88). The statement of Miss Scott reported that she heard several shots, that only one man fled the cab, and that he had on a light shirt and dark pants (Tr. 90-91). The statement of

The deputy coroner testified that cause of death was a gundhot wound in the aorta. There were three other bullet wounds in the chest, neck, and shoulder, and the throat had multiple lacerations. (Tr. 96-100).

Police witnesses testified that there was a hole through the back of the front seat in the cab. On the rear floor of the cab in a pool of beer was a beer can bearing appellant Philson's fingerprint on the top, a can top tab, a black low-cut man's shoe, and an expended slug. There was some change scattered on the floor of the cab in front, but Bennett's watch, folding money, wallet, and money belt appeared untouched. There was blood on the front and rear seats. (Tr. 121-22, 151-56, 160, 163, 189-94). A pistol similar to one seen in Bennett's possession earlier in the morning, which had been fired four times, was found between the seat and the back rest of the front seat of the cab. (Tr. 33-34, 151, 162-63).

Police at the scene found a trail of blood drops along the south sidewalk line of Q Street from a point west of 9 Q Street to First Street, N.E.; on First Street one block from Q to Quincy Place on the north; and on Quincy Place from First Street to mid-way between 41 and 43 Quincy

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1/ (Footnote continued from previous page).

Miss Manigan reported that a boy fled the cab, dressed in a beige colored short sleeve shirt and beige colored trousers. (Tr. 95).

Place. There were no deviations into walkways or yards. (Tr. 158-60, 178-80).

A resident of Quincy Place, N.E., Elijah Roberson testified that at about 4 a.m. a person he identified as appellant Philson came to the door of 53 Quincy Place and asked to use the telephone.[2/] Roberson testified that the person was holding one of his hands on which there was something red. Roberson's mother informed the person that the phone was disconnected. The person left the porch and helped another man who was stooped over up Quincy Street, either west toward Lincoln Road or east toward First Street, N.E. -- the witness testified positively as to both. (Tr. 64-82).

At about 5 a.m. police and an ambulance were called to appellant Matthews' home at 713-1/2 Thirteenth Street, N.E., where Matthews lay injured with bullet wounds in his left leg and right shoulder.[3/] Philson was present and had on blood-stained clothes but appeared uninjured.[4/] Matthews reported to

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2/ Roberson testified that Philson was wearing brown khaki pants and a light jacket shirt. (Tr. 68-69).

3/ Officers Butler and White testified that Matthews was wearing a black short sleeve shirt and a pair of blue trousers but no shoes. (Tr. 126-35, 141).

4/ Officer Butler testified that Philson had on khaki pants and a plaid shirt that had a combination of colors -- blue and red -- he thought. (Tr. 128, 137). Officer White testified that Philson had on khaki trousers. (Tr. 141).

police officers that he had received the injuries in a fight on Wylie Place. Philson told police he had encountered Matthews at 12th and H Streets and had helped him the rest of the way home. Philson left after Matthews was taken to Casualty Hospital. (Tr. 104, 125-132, 136-43, 218). The bullets taken from Matthews' leg and shoulder were later found to match the cab driver's pistol (Tr. 104-05).

At about 6 a.m., while Matthews was being treated at Casualty Hospital, appellant Philson appeared to request treatment for a puncture wound in the left hand. He reported to police officers that he had been mugged near a bootleg joint at 14th and H Streets, N.E. He was wearing different clothes from those he had been wearing at Matthews' apartment. (Tr. 133-46).

When arrested in the Robbery Squad room at Police Headquarters the following day, Philson was found to have a pocket knife with a red substance on the blade. (Tr. 165-170, 209-13).

ARGUMENT

THE EVIDENCE AGAINST APPELLANT PHILSON WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

> [With respect to his argument on insufficiency of the evidence, Appellant Philson respectfully invites the Court's attention to the following pages of the reporter's transcript in Criminal No. 1150-67: Tr. 1-2, 31-35, 37-39, 46-48, 50-59, 62-82, 84-86, 88, 90-91, 94-100, 104-05, 121-22, 126-46, 151-56, 158-70, 178-80, 189-94, 209-13, 218-32, 256-72.]

Pursuant to Federal Rule 29(a) appellant Philson moved at the close of the government's case for acquittal on the ground that insufficient evidence of his guilt had been introduced (Tr. 224-32). The trial court's denial of this motion was erroneous under the applicable legal standards.

In ruling on appellant Philson's motion for acquittal, the trial judge was required to determine whether there would be a doubt in a reasonable mind that every reasonable hypothesis of innocence was excluded. It is well-settled law in this jurisdiction that:

> It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the

fixed bounds of jury consideration. . ..

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion. . .. [Curley v. U.S., 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232 (1947), cert. den. 331 U.S. 837 (1947)(footnotes omitted).]

Where the evidence falls short of proof "beyond a reasonable doubt" this court has consistently reversed the trial court's failure to direct a verdict of acquittal. See Borum v. U.S., 127 U.S.App.D.C. 48, 380 F.2d 595 (1967); Cephus v. U.S., 117 U.S.App.D.C. 15, 324 F.2d 893 (1963); Campbell v. U.S., 115 U.S.App.D.C. 30, 316 F.2d 681 (1963); Isaac v. U.S., 109 U.S.App.D.C. 34, 284 F.2d 168 (1960); Collins v. U.S., 101 U.S.App.D.C. 160, 247 F.2d 566 (1957); Scott v. U.S., 98 U.S. App.D.C. 105, 232 F.2d 362 (1956); Freidus v. U.S., 96 U.S.App. D.C. 133, 223 F.2d 598 (1955); Cooper v. U.S., 94 U.S.App.D.C. 343, 218 F.2d 39 (1954).

A. The Evidence Did Not Exclude Every Reasonable Hypothesis but that of Guilt.

Where the evidence against a defendant is wholly circumstantial, as it is in this case, there must be substantial evidence of facts which exclude every reasonable hypothesis but that of guilt. Carter v. U.S., 102 U.S.App.D.C. 227, 231-32, 252 F.2d 608, 612-13 (1957). In Carter the Court held that

it was not enough that the hypothesis of guilt be more likely than that of innocence; rather, in order to sustain the conviction, any reasonable hypothesis of innocence must be excluded by the facts. Cf. Hammond v. U.S., 75 U.S.App.D.C. 397, 127 F.2d 752 (1942); Williams v. U.S., 78 U.S.App.D.C. 322, 323, 140 F.2d 351, 352 (1944); Kemp v. U.S., 114 U.S. App.D.C. 88, 311 F.2d 774 (1962); Stevens v. U.S., 115 U.S.App.D.C. 332, 319 F.2d 733 (1963). This is the rule in this jurisdiction, and it is generally accepted in other federal courts. See, e.g., Matthews v. U.S., 394 F.2d 104 (9th Cir. 1968); Thomas v. U.S., 369 F.2d 372 (9th Cir. 1966); U.S. v. Dolasco, 184 F.2d 746 (3d Cir. 1950); Riggs v. U.S., 280 F.2d 949 (5th Cir. 1960); Davis v. U.S., 385 F.2d 919, 921 (5th Cir. 1967).

In the Kemp case, supra, where the defendant was convicted of aiding and abetting the unauthorized use of a motor vehicle, there was no direct evidence of scienter. The prosecution attempted to supply this element by showing that the defendant was a passenger in the vehicle and did and observed certain other things. All these things, the Court noted, however, were consistent with innocence as well as with guilt, and hence the Court held that the judge erred in not taking the case from the jury. Conviction, the Court said, required more than evidence that the defendant did things a person might do with or without guilty knowledge. Without evidence from which guilty knowledge could be unambiguously

inferred, the jury's verdict could have been reached only by impermissible speculation as to that element of the offense.

In Stevens, supra, a similar case, this Court said in reversing the conviction of a passenger in a stolen car, "There is evidence which suggests guilt . . .. Perhaps it could be said there is a preponderance of evidence against Mackey but that is not enough to meet the standard of proof in a criminal case." 115 U.S.App.D.C. at 334, 319 F.2d at 735; cf. Cooper v. U.S., 94 U.S.App.D.C. 343, 346, 218 F.2d 39, 42 (1954).

Likewise, in Cooper v. U.S., 123 U.S. App.D.C. 83, 85, 357 F.2d 274, 276 (1966), Judge Edgerton stated:

> . . . I think the Government's evidence was only sufficient to create a reasonable suspicion, or at most a likelihood, that Cooper was guilty. Perhaps the jury could reasonably think he was probably guilty, but this is not enough to support a criminal conviction.

In this case the government's evidence connecting appellant Philson with the homicide -- leaving aside the internal inconsistencies and the incredibility of some of it -- showed at most (1) that a beer can bearing appellant's finger-print was found in the cab; (2) that some witnesses were prepared to testify that a man wearing khaki pants was seen fleeing from the victim's cab and that appellant Philson was seen that morning dressed in khaki pants; (3) that appellant Philson was seen in the neighborhood about 4 a.m., dressed in khaki pants in the company of another man who had been injured; (4) that Philson had blood on his hand at about 4 a.m. and was treated for a puncture wound in the hand of recent origin at

6 a.m.; and (5) that when arrested the following day appellant had in his possession a pocket knife on one end of which there was a substance "which appeared to be blood" (Tr. 209).

Taking these points individually, each is fully consistent with appellant's innocence.

(1) The presence on the floor of the cab of a beer can with appellant's fingerprint is fully consistent with appellant's having ridden in the cab earlier in the evening, since the government's evidence was that Bennett was hacking in the area earlier that evening. Certainly appellant's mere presence in the cab on the morning of the crime would not have been sufficient to convict. Cf. Jones v. U.S., 119 U.S.App.D.C. 213, 338 F.2d 553 (1964) (per curiam). The government evidence certainly does not exclude the hypotheses that Philson gave the can to one of Bennett's passengers or Philson himself rode in Bennett's cab earlier in the evening.[1/]

1/ At trial the government relied on the fact that at 4 a.m. the spilled beer was cool to the touch. As pointed out by appellant's trial counsel (Tr. 231), it is a physical fact that any such liquid would seem cool to the touch. Without evidence as to the actual temperature of the beer at 4 a.m., from which some inference might have been drawn (in the same way the time of death may be established from the temperature of a body) as to how long it had been out of a cooler, the recentness of the introduction of the beer into the cab is purely speculative. Indeed, the mere recentness of introduction is not necessarily inconsistent with an innocent hypothesis. Most significantly, the government adduced no testimony that the beer can itself was sweating, and the fact that appellant's body oil adhered to its surface at all suggests he touched it when it was not cold.

In Borum v. U.S., 127 U.S.App.D.C. 48, 380 F.2d 595 (1967), this Court held that a conviction for housebreaking could not be predicated on fingerprints "lifted" from objects in the complainant's home in the absence of evidence that such objects were generally inaccessible to the defendant because of the custody or location of the objects prior to the crime. Borum stands for the proposition that the government must negate the possibility of an innocent explanation for fingerprints found at the scene of the crime. Such evidence would be testimony that defendant had no legitimate access to the robbed home. See Stevenson v. U.S., 127 U.S.App.D.C. 43, 380 F.2d 590 (1967).

Similarly, in Hiet v. U.S., 124 U.S. App.D.C. 313, 365 F.2d 504 (1966), the mere presence of a fingerprint taken from the inside of the vent window of a parked automobile from which personal property had been stolen was held insufficient to sustain a conviction for grand larceny. Cf. Cephus v. U.S., supra, where defendant's fingerprint was found on the outside of a stolen car.

Here, more clearly than in either Borum or Hiet, appellant could have innocently ridden in a licensed taxicab, just as any other member of the public. And, as suggested above, the presence of the beer can in the cab does not compel the inference that appellant was himself in the cab. As the court knows from the Cooper case, prints may last for years.

94 U.S. App.D.C. at 344, 218 F.2d at 40. See also footnote 1 at page 11, supra.

(2) The fact that two witnesses testified that a man wearing khaki pants was seen fleeing the cab and that Philson was wearing khaki pants on that morning is manifestly insufficient to support the conviction. Khaki pants are simply too common to connect Philson with the scene of the crime. The tenuousness of this connection is further weakened by the conflicts in descriptions of the shirt worn with these pants: Was it light or light blue as Miss Walker testified? Was it khaki as Mr. Kelly testified? Was it beige as Mr. Reeder and Miss Manigan stated? Was it a light color as Mr. Roberson testified? Was it a blue and red plaid as Officer Butler testified? Certainly the evidence is fully consistent with the hypothesis that someone other than appellant fled the cab.

(3) and (4) Roberson testified that Philson was on the porch of his house on Quincy Place at about 4 a.m. Philson, he said, was holding one of his hands on which there was something red. Philson left the porch and helped another man who was stooped over up Quincy Street, either west toward Lincoln Road or east toward First Street, N.E. -- the witness testified positively as to both. This testimony is fully consistent with several innocent hypotheses. At most it places Philson in the neighborhood at 4 a.m. with a puncture wound in the hand and in the presence of Matthews. But even this is fully consistent with Philson's role as a Good Samaritan who

is himself injured in defense of another or as a bystander or in an unrelated accident (Tr. 130, 142-43).

(5) Philson's possession at the time of his arrest in the robbery squad room at police headquarters the following day of a knife on one end of which there was a red substance "which appeared to be blood" is consistent with involvement, but it is equally consistent with non-involvement. There is no showing that the blood is that of Bennett or that of Matthews or that of Philson or even that it is human blood. The blood could have come from anywhere, especially since there is no evidence that the knife even belonged to Philson or how long he had had it in his possession. Even if the blood is that of Matthews or Philson, this is not inconsistent with Philson's role as a Good Samaritan. Nor, it might be added, would the fact that it was Bennett's blood establish more than the presence of the knife in the cab at the time of the crime.

Taking the foregoing items collectively, they are not sufficient to sustain appellant's conviction for murder. While the evidence may well raise a suspicion that appellant Philson was in the taxicab at the time Bennett was killed (which killing was murder) and that appellant might have participated in some way in the murder, mere suspicion is not enough. Cf. Stevens v. U.S., supra; Cooper v. U.S., quoted at page 10, supra; Kemp v. U.S., supra. Nor can the evidence be taken to exclude the hypothesis that the co-defendant Matthews, alone or in the

company of someone other than appellant Philson,[1/] was shot by Bennett and was encountered by Philson on the street and assisted home, and that Philson's hand was injured by someone other than the cab driver.

The government's evidence, giving full range short of speculation to the jury to draw inferences and resolve conflicts, cf. Curley v. U.S., supra, shows at most that appellant Philson was an accessory after the fact, 22 D.C. Code § 106, an indictable crime with which he was not charged. Cf. Smith v. U.S., 113 U.S.App.D.C. 126, 306 F.2d 286 (1962). There is a total and utter lack of evidence which establishes Philson's whereabouts prior to the crime or that he participated in any way in the crime itself. At most, the evidence might implicate Philson as an accessory after the fact on the theory that he was present at the crime and/or assisted Matthews away from the scene of the crime. Indeed, it is doubtful that the government has supplied evidence establishing all the elements necessary to convict even under Section 106.

B. The Jury Was Allowed to Speculate as to Which One of Appellants was Guilty, There Being No Evidence as to Aiding and Abetting.

Assuming arguendo that the jury might properly have found that both appellants were present in the taxicab at the time Bennett was murdered and further that one of them did

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1/ The failure of the government to produce the murder weapon at trial is consistent with the hypothesis that someone other than Philson was in the cab.

murder Bennett, the jury was allowed to speculate as to which one of appellants was guilty. The record contains no evidence that appellant Philson shot Bennett or aided and abetted Matthews in the murder of Bennett. The trial judge should have granted appellant's motion for acquittal on this ground. Even assuming that the motion for acquittal was properly denied, the jury would have been confused by trial court's charge on aiding and abetting.

The government produced no witnesses to the slaying of Bennett. Assuming that both defendants were in the cab at the time Bennett was shot, there is no evidence that more than one defendant shot Bennett. There is no evidence that either aided or abetted the other within the intendment of 22 D.C. Code § 105. Under these circumstances there is no basis in the record for permitting the jury to convict more than one defendant. Moreover, there is no basis in the record for the jury's choosing between the defendants, so that conviction of either would have rested on pure speculation.

Mere physical presence of the defendant at the time and place of commission of the crime is not by itself sufficient to establish his guilt as an aider and abettor. The jury must find some affirmative conduct in furtherance of a common criminal design or purpose in order to find a defendant guilty as an aider and abettor. U.S. v. Williams, 341 U.S. 58, 64-65 (1951); Cooper v. U.S., 123 U.S.App.D.C. 83, 357 F.2d 274 (1966); cf. Jones v. U.S., D.C. Circuit No. 21,866 (decided October 17, 1968); U.S. v. Honeycutt, 311 F.2d 660, 662(4th Cir. 1962); U.S. v. Neverson,

1 Mackey (12 D.C.) 152, 156-57 (1880).

In U.S. v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), where the appellant was one of two convicted on a counterfeiting charge, the Court reversed the conviction on the ground that presence and knowledge were not enough and that the trial judge should have charged the jury that aiding and abetting required participation.

The trial court's charge on aiding and abetting (Tr. 262-63) obscured the very vital point that the jury could not convict either defendant, assuming it found both to be present, in the absence of evidence that one defendant aided and abetted the other. While the judge's charge necessarily had to encompass the possibility that the jury would find that either or both were not present, the general principles stated did not give adequate guidance to their application to the particular fact hypothesis here suggested. Where a subtle legal point such as this is presented, the trial judge must necessarily explain the point to the lay jurymen in order for them to act intelligently. His failure to do so was plain error and highly prejudicial to appellant. Cf. U.S. v. Garguilo, 310 F.2d 249, 254-55 (2d Cir. 1962); Moore v. U.S., 356 F.2d 39, 43 (5th Cir. 1966).

CONCLUSION

The judgment below should be reversed. If the determination of this Court is that there was insufficient evidence to support the jury's verdict of guilty on Count

Two, the case should be dismissed in any event. If the determination of the Court is that the judge's charge on aiding and abetting was prejudicial to appellant, the case should be remanded to the District Court for retrial.

Respectfully submitted,

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(Appointed by this Court)

January 21, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be delivered by hand this 21st day of January, 1969, a copy of the foregoing brief for appellant Philson to the office of the U.S. Attorney for the District of Columbia, 3818 U.S. Courthouse, Washington, D.C. 20001.

William Malone

WILLIAM MALONE

January 21, 1969.

APPENDIX

Statutes and Rules

22 D.C. Code:

§ 22–105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 908.)

§ 22–106. Accessories after the fact.

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than twenty years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 909.)

§ 22–501. Assault with intent to kill, rob, rape, or poison.

Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than two years or more than fifteen years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 803; Dec. 27, 1967, Pub. L. 90–226, § 601, title VI, 81 Stat. 736.)

§ 22-2401. Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339.)

§ 22-2403. Murder in second degree.

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339.)

§ 22-2405. Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802.)

Federal Rules of Criminal Procedure:

Rule 29. Motion for Judgment of Acquittal

(a) **Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. As amended Feb. 28, 1966, eff. July 1, 1966.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisk.

III

ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

1. Whether a reasonable juror must necessarily entertain a doubt as to appellants' guilt of second degree murder, where among other things the evidence showed (a) that a volley of shots was followed by the almost simultaneous emergence of the fatally wounded decedent and two men from decedent's moving taxi cab, (b) that a trail of blood led from this scene to a point at which Philson was recognized assisting a wounded man, (c) that an hour thereafter two bullets fired from the decedent's gun were removed from Matthew's body, and (d) that Philson's fingerprint was found on an open can of cool beer in the back seat of decedent's taxi cab.

2. Whether it was proper for the jury to find both appellants guilty of second degree murder (or aiding and abetting) where the evidence showed that the deceased had been *both knifed and shot,* that Philson assisted Matthews from the scene of the crime and that later both appellants fabricated stories concerning their wounds?

3. Whether appellant Matthews may properly ask for remand on the basis of possible pre-trial identification where, despite notice of the availability of identification defenses, he tactically chose to make no trial record in this regard and where it is sheer speculation that any pre-trial identification in fact took place at all?

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* This case has not previously been before this court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,731

WILLIE J. PHILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,732

JERRY M. MATTHEWS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By three count indictment filed September 11, 1967 appellants were charged with felony murder, first degree murder and assault with intent to commit robbery (22 D.C. Code §§ 2401 and 501). These charges arose out of

the brutal killing of Clarence H. Bennett, a District of Columbia cab driver, in the early morning hours of July 9, 1967. Tried before a jury by the Honorable Richmond B. Keech from November 28 to December 1, 1967, appellants were found guilty of the lesser included offense of second degree murder. Appellants were acquitted of first degree murder, felony murder and assault by the court at the close of the evidence (Tr. 248-249). On January 26, 1968 each appellant was sentenced to a term of imprisonment from 8 to 24 years. These appeals followed.

Before the swearing of the first witness it was stipulated that the body of the Clarence H. Bennett mentioned in the indictment was identified at the District of Columbia Morgue on July 9, 1967, by Joseph McKie and Robert Hunter (Tr. 20).

William David Ferguson and Robert Edward Tucker then testified that they saw the deceased at a restaurant called the Dairy Delight, 1312 New Jersey Avenue, N. W. between 3:30 and 3:45 a.m. on the morning of July 9, 1967 (Tr. 32, 45). Bennett appeared sober and showed no evidence of injuries of any kind (Tr. 33, 46). Ferguson testified that Bennett showed him a .22 caliber revolver with a white handle similar to Government's Exhibit No. 2 (Tr. 34). At that time both witnesses saw appellant Jerry Matthews who came out of the restaurant (Tr. 37, 47), asked if any cab drivers were working and walked off across New Jersey Avenue (Tr. 48, 57). Neither witness noticed any evidence of bleeding on the part of Matthews, who appeared to Ferguson to be without injury, while Tucker noticed him "hopping on his right foot" (Tr. 37, 48). The deceased left the Dairy Delight a "couple of seconds" after Matthews (Tr. 38).

At approximately 4 a.m. on the night of the murder Willie Mae Walker, who was residing at 21 Q Street, N.E., heard noises "like a firecracker" and observed a cab going by her home on the wrong side of Q Street. She noticed two Negro men get out of this cab on the right hand side and run east past her house. They were not running fast and one was holding his hand. A short time

later she went to investigate and found a man lying in a vacant lot on the corner of Q Street and Florida Avenue and a cab stopped on the safety island in the center of North Capitol Street (Tr. 50-53).

Robert Kelley lived at 9 Q Street, N.E., the house next to the vacant lot (Tr. 58). On the morning in question he heard a car scrape another car and looked out his window observing two small young men, one with khaki trousers, running slowly ("making a poor out running") east on Q Street (Tr. 55-57).

Elijah Roberson was sleeping in the living room of his mother's house at 53 Quincy Place N.E., a house on the next block, one block over from Q Street, N.E. At approximately 4 a.m. he was awakened by voices on the front porch. Going to the window he saw appellant Philson, whom he had known for "about 10 or 12 years" (Tr. 67). Philson who was holding his hand which had "some red" on it and "might have been cut and bleeding," was telling Roberson's mother upstairs that he wanted to use the telephone. Learning the phone was disconnected Philson left the porch and commenced assisting "another fellow" "who was drunk or something like that" up the street. This witness recalled that Philson was wearing khaki pants (Tr. 64-68). On cross-examination Roberson stated that Philson and his companion headed west as they left his mother's home; however, upon having his recollection refreshed with his statement given the police four months previous, he stated that they headed in the opposite direction (Tr. 80).

At this point the following stipulations were read into evidence:

1. Sometime after 3:30 a.m. on July 9, 1967 Joseph Reeder, residing at 16 Q Street, N.E. heard a crash like an auto accident. Looking out his window he saw a cab rolling toward North Capitol Street. He then heard four or five shots and saw two men emerge from the cab. Both men were 5′5″ to 5′7″ tall weighing between 130 to 150 lbs. The subjects wore maroon and beige shirts. (Tr. 84-86.)

2. At 4 a.m. July 9, 1967, cab driver Alfred Sybot was stopped for a traffic light on Florida Avenue, N.E. at North Capitol Street, when he heard two or three shots. A few seconds later he observed a man run into an empty lot and fall down, and a cab drifting out of Q Street onto the median strip of North Capitol (Tr. 87-88).

3. Paulette Scott, a passenger in Mr. Sybot's cab, heard the shots and saw the things related by the cab driver but added that she saw another man running up Q Street (Tr. 90).

4. Cab driver, Robert Long, Jr., also saw the decedent's cab roll out of Q Street and the deceased lying in the empty lot (Tr. 92-93).

5. Linda Manigun, a passenger in a car heading east on Q Street, N.E., saw a boy wearing beige colored shirt and trousers emerge from this cab and run east on Q. (Tr. 94-95.)

Then Dr. Marion Mann, the Deputy Coroner of the District of Columbia on July 9, 1967, testified to the results of the autopsy he had performed on the body of Clarence Bennett. The deceased had sustained gunshot wounds, in the chest, back of the neck, back of the right shoulder, and right side. Powder burns indicated that the first three shots were fired from very close range. The fourth shot was fatal, piercing the aorta and the heart. In addition the decedent's throat was cut four times. (Tr. 96-100.)

Next more facts were stipulated into evidence:

1. On the morning of July 9, 1967 Jerry Matthews was taken to Casualty Hospital where two .22 caliber bullets were extracted from his body (Tr. 104).

2. Government's Exhibit No. 2 a .22 caliber revolver (introduced into evidence Tr. 107) was found in Bennett's cab on the morning Bennett was killed (Tr. 104-105).

3. The bullets taken from Matthew's body were examined by an FBI Laboratory ballistics expert who was of the opinion that they were fired by Government's Exhibit No. 2, the revolver found in the cab (Tr. 105).

4. In the opinion of this ballistics expert the four bullets taken from the deceased's body were not fired from Government's Exhibit No. 2 (Tr. 106).

Next Metropolitan Police Detective Edwin Coppage testified that he arrived at the scene of the homicide at 4:10 a.m. This witness discovered a trail of blood commencing at 9 Q Street that went along this area of Q Street across up First Street and down past 53 Quincy Place. (Tr. 111-113.)

Private Vernon M. Butler of the Metropolitan Police Department testified that at 5 a.m. on the morning of July 9, 1967 he received a radio run to respond "for a shooting" at 712½ Thirteenth Street, N.E. At that premises he found the appellants (Tr. 125). The bloodied Matthews was lying on a couch shoeless suffering from injuries to his left leg and right shoulder (Tr. 126-127). Matthews told the officer he had been jumped and shot on Wiley Street by a group of unidentified men, one of whom "he had trouble with" a few weeks prior (Tr. 128-129). In response to Officer Butler's inquiry concerning the blood on his khaki trousers Philson explained that he had assisted Matthews home from 12th and H Streets (Tr. 130).

This officer further testified that just after an ambulance took Matthews to Casualty Hospital, he observed Philson walking in a direction away from the hospital; however, while completing his report on Matthews, members of Casualty Hospital staff requested that Officer Butler investigate another shooting victim. This turned out to be Philson in a new set of clothes. While being treated for a gun shot in his hand, Philson explained he had just been jumped and robbed by three subjects who shot him (Tr. 133-134).

Officer Arthur White corroborated most of the events testified to by Butler. This witness additionally overheard Philson request the doctor attending him to inform the police that his injury had just happened (Tr. 145-146).

John Cannon of the Homicide Squad repeated several aspects of the Government's evidence and described the condition of the deceased's cab as it straddled the North Capitol median strip that morning. Of significance were his observations of the following items; a .22 caliber revolver wedged between the front seat and front backrest, change, cigarettes and a man's cap strew on the front floor, blood on the top of the front backrest, a bullet hole the size of a .22 caliber bullet through the backrest, a partially spilled can of beer, an expended .22 caliber slug and a black man's shoe in the backseat. Additionally there was blood on the rear seat and backrest. (Tr. 150-154.) After noting that the revolver in the front seat contained four expended shells (Tr. 162), this witness testified that he was later present at the arrest of appellant Philson on July 10, 1969 and at that time he removed a "pegged" [1] single blade knife from Philson's right trousers pocket (Tr. 196). The end of this knife contained a substance which appeared to be blood (Tr. 209).

It appeared during cross-examination of this witness that the last legible discharge entry on the deceased's cab manifest showed 3:25 a.m., July 9, 1967 (Tr. 182).

Finally Officer Robert Puckett of the Identification Bureau, M.P.D., was qualified as an expert fingerprint analyst (Tr. 185) and testified that he had lifted a latent print from the beer can found in the back seat of Bennett's cab (Tr. 190). In this witness' opinion this print matched that made by the left middle finger of appellant Willie Philson (Tr. 194).

Neither appellant testified or presented evidence.

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[1] "You take a piece of cardboard or wooden match and stick it in the casing so that the blade sticks up so you can flick it easily". (Tr. 169.)

ARGUMENT

I. The evidence that appellants committed second degree murder was compelling and amply supports the jury's verdict of guilt.

(Tr. 262-263)

The United States feels that the record in this case constitutes a veritable brief against appellants' evidentiary arguments. Thus, in an attempt to avoid repetition, we here feel it sufficient briefly to give a limited re-attention to the facts where response to specific points raised by appellants is in order.

The only argument here open to appellants is that the trial court as a matter of law should not have let the case go to the jury. In making a decision on this point the judge below, and now this Court, "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967). Then

> if [the trial judge] concludes that either of two results, a reasonable doubt or no reasonable doubt is fairly possible, he must let the jury decide the matter (*Curley* v. *United States*, *supra*, 81 U.S. App. D.C. at 393, 160 F.2d at 233.)[2]

Judged by this standard can it be said to be an impermissible inference that Matthews and Philson were the

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[2] Appellants' argument "A" seems to confuse the jury instruction approved in *Carter* v. *United States*, 102 U.S. App. D.C. 227, 232, 252 F.2d 608, 613, (1957) with the above *Curley* standard to be applied by a trial judge in ruling on a motion for acquittal. The standard that a trial judge must not submit the case to the jury unless the facts exclude every reasonable hypothesis of innocence was once and for all flatly rejected by the *Curley* court (82 U.S. App. D.C. at 395, 160 F.2d at 235). Judge Prettyman's *Carter* opinion will be read as merely re-echoing the principles for jury instruction that he set out in *Curley*. Accord *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

men seen fleeing Bennett's cab as he staggered out and died, where a trail of blood leads to a point where Philson was recognized assisting a wounded man and Matthews is found an hour later in Philson's presence with two bullets from the deceased's gun lodged in his body? Once identity is established the eight wounds in decedent's body compel the conclusion that appellants, had at the very least, committed second degree murder.

Appellants' real complaint seems to be that the evidence against them was circumstantial and not direct. As long as it meets the reasonable doubt standard circumstantial evidence alone is clearly adequate to sustain a conviction. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Hardeman* v. *United States*, 82 U.S. App. D.C. 194, 163 F.2d 21 (1947). Appellate Courts apply no special rules when reviewing this type of evidence. *Bowler* v. *United States*, 249 F.2d 806 (9th Cir. 1957). And it is in no way an inferior kind of evidence *United States* v. *Smith*, 179 F.Supp. 684, 687, *aff'd*, 109 U.S. App. D.C. 28, 283 F.2d 607 (1960), *cert. denied*, 364 U.S. 940 (1961). *Vuckson* v. *United States*, 354 F.2d 918 (9th Cir. 1966); *United States* v. *Woodner*, 317 F.2d 649 (2nd Cir.) *cert. denied*, 375 U.S. 903 (1963).

Appellants suffer from their insistence on viewing the evidence in a piecemeal fashion. Appellee readily concedes that taken in isolation many aspects of its evidence are equally consistent with innocence (were this the standard by which this Court has to judge the evidence). Such compartmentalization, however, is not the proper procedure for purposes of review. "[T]he jury must take the Government's case as a whole and determine whether as a whole it proves guilt beyond a reasonable doubt." *Bailey* v. *United States*, No. 21,428, D.C. Cir. (March 7, 1969) (slip op. 9) quoting from *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963).

> [T]he question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt. *DeVore*

v. *United States*, 368 F.2d 396 (9th Cir. 1966) [quoting *Dirring* v. *United States*, 328 F.2d 512, 515 (1st Cir. 1964)].

For example Jerry Matthews' conduct in seeking a cab at the Dairy Delight just prior to the murder is perfectly innocuous, until it is seen in conjunction with the fact that Philson was recognized assisting a wounded man away from the scene of the crime and one hour later Matthews is found with Bennetts' bullets in him in the company of Philson. Likewise Philson's wearing blood-soaked khaki trousers when the officers responded to 713½ 13th Street on the night of the murder and the blood-stained knife seized upon his arrest are meaningless until viewed with the facts that four witnesses saw a man in khaki clothing running from the deceased's cab after shots were fired and that the deceased's throat was slit four times.

In this regard appellants' strong reliance upon the "isolated fingerprint cases" of *Borum*,[3] *Hiet*,[4] and *Cephus*[5] is clearly misplaced. In those cases the Government's evidence showed little more than a fingerprint of the accused in a location generally accessible to him. In no way do those cases represent a condemnation of the use of fingerprints as evidence. Here Philson's fingerprint on the can of cool beer in the back seat of the decedent's cab was by no means isolated. It served to corroborate the identification of Philson at the end of the trail of blood and tied him to the deceased's cab as firmly as did the bullets extracted from Matthews' leg and shoulder.

Likewise the court need not hesitate over appellants' contentions that the jury was forced to speculate as to which appellant was guilty. The fact that cabdriver Bennett was knifed four times and also shot four times while vigorously trying to defend his life almost compels the

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[3] 127 U.S. App. D.C. 48, 380 F.2d 595 (1967).

[4] 124 U.S. App. D.C. 313, 365 F.2d 504 (1966).

[5] 117 U.S. App. D.C. 15, 324 F.2d 893 (1963).

conclusion that his death was the result of a joint effort. It simply goes against common experience to assume that the same person would or indeed could fire three bullets into the back of a victims' head while simultaneously cutting the front of his throat four times. Additionally once appellants are placed in the deceased's cab,[6] the evidence shows that they emerged and fled together, that Philson was physically assisting Matthews at the end of the trail of blood on Quincy Place and that they later both felt it necessary to fabricate explanations for their gunshot wounds.

Aiding and abetting "makes a defendant a principal when he consciously shares in any criminal act." *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949). Certainly the different wounds of the deceased, combined with appellants' presence and their joint efforts to escape and deceive the police[7] to become the equivalent of that "evidence of an act of relatively slight moment" that "may warrant a jury's finding participation in a crime." *United States* v. *Garguilo*, 310 F.2d 249 (2nd Cir. 1962) (relied upon by appellants). It is axiomatic that aiding and abetting can be inferred from circumstantial evidence. *United States* v. *Ragland*, 375 F.2d 471, 477 (2nd Cir.), *cert. denied*, 390 U.S. 925 (1967). Thus appellants' charges that there was no evidence of aiding and abetting are not warranted.

Similarly the charge (Philson Br. 17, Matthews Br. 19) that the judge's instruction somehow obscured the requirement that the jury find participation in the crime in order to convict of aiding and abetting is simply not borne out

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[6] Appellants concede this *arguendo* in order to contend that there was no evidence of aiding and abetting.

[7] Appellant Philson's allegation (Br. 15) that his conduct at best shows he was an accessory after the fact is not well taken. Just as his only authority, *Smith* v. *United States*, 113 U.S. App. D.C. 126, 306 F.2d 286 (1962), indicates that an accessory after the fact charge, charge is not precluded by the accused's presence throughout the crime, aiding and abetting is not precluded by, and indeed can be inferred from, actions after the crime. *Long* v. *United States*, 124 U.S. App. D.C. 15, 21, 360 F.2d 829, 836 (1966).

by the record. Among other things the judge instructed in this regard that

> it is sufficient if the government proves that the defendant was knowingly acting in concert and participating with another who did shoot the decedent. * * * a person who participates or advises or connives in any criminal offense or aids or abets the principal offender is himself as guilty * * * mere physical presence when the offense is committed is not enough * * *. It is essential that the aider and abetter share in the criminal intent * * * (Tr. 262-263).

In the complete absence of any objection to this instruction by two diligent and experienced trial practitioners, appellants should be precluded from complaining for the first time in this Court. Rule 30, Fed. R. Crim. P. No expanded aiding and abetting charge was requested as in *Moore* v. *United States*, 356 F.2d 39 (1966) and this was not a crime of unusual circumstances (counterfeiting) in the sense that the second circuit felt a more detailed aiding and abetting struction was appropriate in *United States* v. *Garguilo*, *supra*, where, "if the evidence" "passed the test of sufficiency", it did so "only by a hair's breath." (310 F.2d at 254.)

II. The record contains absolutely no basis for appellant Matthews' pre-trial identification claim which is raised for the first time on appeal.

The best support for appellant Matthews' request for a remand in order to develop *possibly* impermissible circumstances surrounding a *possible* pre trial identification is a totally barren record. An initial request for such relief at this late stage of his case is totally improper by traditional appellate standards. By the time this case came to trial in late November, 1967 defense counsel had had five and one half months notice of the availability of identification defenses.[8] No claim of ineffective counsel

[8] As the Court is aware *United States* v. *Wade*, 388 U.S. 218 *Gilbert* v. *California*, 388 U.S. 263 and *Stovall* v. *Denno*, 388 U.S. 293 were decided on June 12, 1967 amid the publicity that accompanies the introduction of a theretofore unavailable criminal defense.

is, or could, be levelled at Matthews defense attorney below. It thus can safely be assumed that he investigated and discarded the possibility of such a defense.

In any event, assuming, *arguendo*, some pre trial identification of Matthews by the decedent's fellow cab drivers, such constituted a very minor facet of the Government's case against Matthews. The testimony that Matthews was at the Dairy Delight Restaurant that fatal morning, spoke softly as to his connection with the crime. It only corroborated the clear message told by the ballistics analysis of the slugs extracted from Matthews body. Considering the totality of the circumstances (*Stovall* v. *Denno*, *supra*, 388 U.S. at 302) it is only speculative that a remand would be in order, even if an impermissible identification were clearly shown. *Cf. Clemmons* v. *United States*, D.C. Cir. No. 19,846 (Dec. 6, 1968). Since the record shows no identification at all, the Court should refuse to consider the issue.[9]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[9] Appellee believes that the cases of this circuit where remand has taken place were all situations where the record reflected a likelihood of impermissible identification. E.g. in *(Calvin) Smith* v. *United States*, No. 20,773 D.C. Cir (June 7, 1968) the court felt that the case contained a substantial issue "plausibly tendered by the circumstances."

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